

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

RURAL ELECTRIC CONVENIENCE COOPERATIVE,)	
CO. and SOYLAND POWER COOPERATIVE, INC.)	
)	
vs.)	
)	Docket No. 01-0675
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY)	
(AMEREN CIPS))	
)	
Complaint Pursuant to Illinois Electric)	
Supplier Act, 220 ILCS 30/1 et seq.)	

**RESPONSE TO RECC's MOTION TO STRIKE
OR FOR LEAVE TO FILE REBUTTAL**

NOW COMES, FREEMAN UNITED COAL MINING COMPANY ("Freeman"), through its attorney, Gary L. Smith, of Loewenstein, Hagen, & Smith, P.C., and in response to RECC's Motion to Strike or for Leave to File a Rebuttal Brief states as follows:

RECC's Motion to Strike alleges that Freeman raised new arguments in its reply to RECC's response, including arguments that: (1) the underground coal interests constitute a separate premises; (2) that the underground coal interests connect the borehole to the main mine shaft; (3) that the underground coal interests are "geographically connected" and constitute a single premises with more than one delivery point; (4) that the mine constitutes a single underground tract that connects the main mine shaft with the borehole; (5) pragmatically applied, the Crown III Mine is a single property right or premises; and (6) that Freeman was merely extending its lines in developing the Crown III Mine at the borehole. Freeman's reply is in direct rebuttal to RECC's response and does not raise new matters. RECC's Motion to Strike is inaccurate, not well reasoned, and should be denied.

MOTION FOR SUMMARY JUDGMENT

Freeman's Motion for Summary Judgment notes on page 2 that central to all of RECC's claims is the issue of whether electric service to the Crown III Mine borehole is new service or not (Mot. for S.J. @2). Although Freeman admits that RECC provided service to customers at the Arnold Premises on the effective date of the Act, the 34.5 KV service to the borehole is not the same service that RECC provided (Mot. for S.J. @15-16). The borehole is located, the borehole was constructed as part of the mine because Freeman could not extend its underground lines any further without severe loss of voltage (Mot. for S.J. @3) and the underground electric load is at many places at one time throughout the mine (Mot. for S.J. @9). It is undisputed that Freeman possesses the rights to mine the 17,500 acres of coal and possessed those mineral rights as part of the Crown III Mine at the time of the Crown III Litigation (ESA 187; Mot. for S.J. @4).

When the ESA 187 case began, Freeman's main mine facility was to be located within RECC's service territory. The Commission determined and the appellate court agreed that the appropriate provider of electric service for the Crown III Mine was CIPS. It then logically follows that, because the mine and 17,500 acres of coal reserves are located under RECC's service territory, the decision to allow CIPS to serve the mine would result in the mining of coal in the area below RECC's territory. When the Commission decided ESA 187, it redesignated a portion of RECC's service territory as CIPS' territory for the surface area of the main mine.

Freeman argued in its Motion that the Crown III Mine Litigation and ESA 187 contemplated that Freeman's mining of approximately 17,500 acres of coal

surrounding its 810 surface area acres as decided in ESA 187 would require the mine to extend out to an area beyond the 810 surface areas and below RECC's territory on the map (Motion for S.J. @11-17). Freeman then argued in its motion that the scope of the Commission's order in ESA 187 was not limited solely to the surface area of Sec. 1, Twp. 11 N., R. 6 W. of the Third P.M. in Macoupin County, as presumed by RECC, because the Commission recognized in ESA 187 that the mining activity would be a continuously moving underground operation (Mot. for S.J. @10). Obviously Freeman would take the electric load underground and below RECC's surface territory. Now the mine has extended out to mine coal below the Arnold Premises. Freeman, in its motion, argued that the borehole is nothing more than the same service to Freeman's Crown III Mine as was contemplated in the original Crown III Litigation (Mot. for S.J. @11) and that the *Old Ben* case supports Freeman's Motion for Summary Judgment. Strangely, RECC's Motion to Strike is silent on the *Old Ben* case.

In analyzing count II, RECC's first substantive count, Freeman argued that RECC's claim under the Service Area Agreement is based purely on the location of the borehole in RECC's service area on the service area maps (Mot. for S.J. @12). Freeman argued that the electric service to underground moving equipment is different than fixed surface service contemplated by the Surface Area Agreement (Mot. for S.J. @12). ESA 187 anticipated that Freeman's electric load would migrate underground throughout 17,500 acres of coal reserves (Mot. for S.J. @10-11, 17). Freeman then argued:

RECC assumes that the Crown III Mine borehole is new service in RECC's territory. RECC is wrong as a matter of law. (Mot. for S.J. @13)

Freeman concluded that since the borehole is part of the natural evolution of the Crown III Mine, it constitutes nothing more than the same service to the same customer as found in ESA 187 (Mot. for S.J. @11). In other words, both the main shaft and the borehole constitute one mine, not two mines (Mot. for S.J. @14). Freeman cited the definition of "coal mine" under Illinois law (Mot. for S.J. @14) and argued that the borehole was part of a single mine.

RECC'S RESPONSE

In its Response, RECC attempted to drive a theoretical wedge between the main mine facility and the borehole by *repeatedly* arguing that the borehole constituted separate premises or a separate location. This "separation theory" was completely contrary to Freeman's original single mine argument, *i.e.*, that the borehole is nothing more than a part of the Crown III Mine and its foreseeable development.¹

RECC cited the statutory definitions of "premises" in its Response @9-10. RECC can't complain now that the application of that definition and the court's test of "location" in the *Coles-Moultrie* case to the Crown III Mine as a whole operates against RECC's separation theory as a matter of law.

Freeman replied, in strict rebuttal, and consistent with the Motion for Summary Judgment, that the Crown III main mine shaft and borehole constitute a

¹ In the Motion for Summary Judgment, Freeman points to a map prepared by RECC and attached to RECC's Complaint as Ex. 4 (as well as attachment 2A to its Response) which, in located the borehole and the main mine shaft, with a title across the top, "Crown 3 Coal Mine Expansion." This is an admission that the borehole is just an expansion of the Crown III Mine (Mot. for S.J. @13).

single mine and not two premises or locations. RECC's biggest complaint now is the irrefutable soundness of Freeman's reply argument. RECC cannot now complain about the deficiencies and weaknesses of its "separation theory" or that the cases it cited (*Coles-Moultrie Electric Cooperative v. Ill.Com.Com.*, 78 Ill.App.^{3d} 165 and *CIPS v. Ill.Com.Com.*, 202 Ill.App.^{3d} 567) actually support Freeman instead of RECC.

RECC recognized Freeman's original argument that the borehole and main shaft constitute one mine when RECC argued in its response:

Freeman bases its Res Judicata argument solely upon the contention that ESA 187 which involved electric service to the Crown III Mine facilities located in Section 1, Nilwood Township, Macoupin County, Illinois, also decided electric service rights to any other "location" to which Freeman's Mine might expand in the future even though such "location" or "premises" was not then and is not now a part of the geographical premises of the Crown III Mine to which electric service was in dispute in ESA 187. (Response @15).

In support of its separation theory, RECC emphasized that the borehole and the main mine shaft are two locations and, asserted that they were "not geographically connected," but were separated by at least one mile, owned by other individuals, and are located in different counties (Response @16). This argument ignored that Freeman's underground distribution system is continuously moving and is connected. The affidavit of Dave Care (Att. 3) explained that the lighting and mining machinery are located over several miles underground and are in use at any one time, and that electric conveyors move the coal from where it is mined back to the main shaft. RECC points to surface ownership by other individuals and ignores Freeman's underground coal rights. RECC points out that the borehole is in a

different county than the main mine shaft, but overlooks that the coal rights are one continuous underground property interest. RECC's unfounded arguments were soundly refuted by Freeman in its reply and RECC cannot now be heard to complain about the effectiveness of the reply.

RECC's argument that the borehole and the main mine shaft are not geographically connected is factually accurate surface-wise, but factually inaccurate as applied to the mine. RECC's own attachments and its own maps show that the borehole and main mine shaft are geographically connected underground. RECC attached a map (Ex. 2B) to its reply showing the interconnected features of the underground mine. When RECC made its argument it assumed that the only geographic connection was on the surface, but, in fact, a coal mine is essentially an underground operation.

It is obvious, that the borehole is connected to the main mine shaft. RECC cannot realistically claim to be surprised that coal rights are real estate interests separate from real estate surface rights. Freeman's reply simply takes the definition of premises, as raised by RECC, and applies it to Freeman's coal rights in the mine.

In its Response RECC argued:

Whether the lime injection/air shaft/borehole is an expansion of the Crown III mine is not even relevant. It is a new service connection point created by Freeman to which CIPS is furnishing electric service which service connection point as defined in Section 30/3.10 of the Act is located on "premises" designated to be served by RECC under the Service Area Agreement.

Obviously RECC recognized that Freeman's argument, *i.e.*, that the borehole is part of the Crown III Mine, was made in the original motion because it argued that

such a position was not relevant because the borehole constituted a separate premises or location. Freeman's Reply to this is not only proper, it illustrates the very purpose for which replies exist. RECC's Motion is meritless and should be denied.

Freeman's reply doesn't raise new matters or new theories. The reply simply points out the flaws and deficiencies in RECC's "separation" argument. RECC's motion now claims that Freeman did not initially argue that the borehole was part of the "premise" of the Crown III Mine. Although Freeman didn't use the word "premise," clearly Freeman argued that the main shaft and borehole constitute one mine. RECC raised the definition of premise or location and Freeman simply responded to that argument by arguing that the mine is one premise. RECC's biggest objection is that the application of the definition of "premises" to Freeman's real estate rights to the coal leads to the inescapable conclusion that the Commission in ESA 187 already disposed of RECC's claims and summary judgment should be granted to Freeman.

Freeman has not misapplied the definition of "premises," which does indicate that there can be more than one point of delivery to the same premises, and there is nothing in the definition of "premises" to indicate that multiple points of delivery to the same premises are to be by different suppliers. Therefore, RECC's new argument in 3C pg. 4 of its motion is without any foundation in the law.

Freeman has not raised any new legal theories, but has consistently argued that the borehole and main shaft are part of one mining operation for Crown III. Therefore, there is no waiver issue involved here. Freeman is not raising a new

claim. Freeman is not raising any claim. The claims are those of RECC. Freeman's Motion for Summary Judgment established that all of RECC's claims are barred by *res judicata* and RECC's response (that the borehole constituted a separate premises or location) was refuted by Freeman in its reply.

In its response, RECC also claimed that there was a disputed fact over:

Whether the lime injection/air shaft located at the "Arnold Premises" is a separate "premises" and/or "location" from the Crown III Main mine facilities located in Section 1, Nilwood Township, Macoupin County, Illinois. and which possesses a separate newly created "normal service connection point" determined in accordance with accepted engineering practices for providing electric service which is in addition to the service connection point for the main mine facilities.

The above quoted language is not a disputed fact but solely a question of law. There is no dispute that there is a separate meter at the borehole. Repeatedly, RECC argues that the service connection point or meter at the borehole constitutes a separate location and was not decided in ESA 187 (Resp. @28). Freeman points out in its Reply that the *Southwestern* case (*CIPS v. Ill.Com.Com.*, 202 Ill.App.^{3d} 567 (1990)) uses the "functional analysis" test that the location of the meter is not a litmus test for determining the location of the service (Reply @11-12). It is where the electricity is being used that counts. The holding in the *Southwestern* case is consistent with the Commission's decision in the *Old Ben* case.

WHEREFORE, Freeman prays that the Motion to Strike or for Leave to File a Rebuttal filed by RECC be denied in total and that its Motion for Summary Judgment be granted, and for such other and further relief as is deemed just.

Respectfully submitted,

FREEMAN UNITED COAL MINING COMPANY

By: _____
Gary L. Smith

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon of all parties to the above cause by [electronic mail] or [enclosing the same in an envelope addressed to such party at their address as follows:

Scott C. Helmholtz
Brown, Hay & Stephens
P.O. Box 2459
Springfield, IL 62705

Jerry Tice
Grosboll, Becker, Tice & Reif
101 East Douglas
Petersburg, IL 62675

Mr. Don Woods
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701

with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Springfield, Illinois] on this 19th day of February, 2003.

Gary L. Smith

Gary L. Smith-#2644029
Loewenstein, Hagen & Smith, P.C.
1204 South Fourth Street
Springfield, IL 62703
Phone: 217/789-0500
Fax: 217/522-6047